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DEPARTMENT OF JUSTICE
Antitrust Division

DONALD J. RUSSELL
Chief
Telecommunications Task Force

May 8, 1997

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Federal Communications Commission
Office of Secretary

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Mr. William F. Caton
Acting Secretary
1919 M Street, N.W., Room 222
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket Nos. 91-221;87-7;94-150;92-51 and 87-154

Dear Mr. Caton:

Today, the attached letter was delivered by the undersigned on behalf of the Department of Justice to the office of Chairman Hundt in connection with the above referenced proceedings. Pursuant to the Commission's ex parte rules, enclosed are ten (10) copies of the letter for inclusion in the public record.

Please call me if you have any questions.

Sincerely,

Donald J Russell

Donald J. Russell

cc: Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Rachelle B. Chong
Commissioner Susan Ness

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DEPARTMENT OF JUSTICE
Antitrust Division

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EX PARTE

May 8, 1997

Chairman Reed Hundt
Federal Communications Commission
Room 814
1919 M Street, NW
Washington, D.C. 20554

Dear Chairman Hundt:

The Federal Communications Commission (the "Commission" or "FCC"), in a series of rulemakings seeks comments on a number of issues relating to the broadcast attribution rules and the national and local television ownership rules.[1] The United States Department of Justice ("Department"), a federal agency responsible for enforcing the antitrust laws and promoting competition, offers these comments for the Commission's

[1]Specifically, the Commission issued two Notices relating to the matters addressed herein: (1) In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221 and In the Matter of Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-7 ("SFNPRM"); and (2) In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150; In the Matter of Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; In the Matter of Reexamination of the Commission's Cross-Interest Policy, MM Docket No. 87-154 ("FNPRM").

consideration in resolving various issues raised in these rulemakings. In the wake of the consolidation in the radio industry made possible by the Telecommunications Act of 1996 ("1996 Act"), the Department has conducted numerous investigations of mergers and other joint activities among radio and television stations, including joint sales agreements ("JSAs") in the radio industry. In a small number of instances, we have challenged arrangements that we concluded would have led to a substantial lessening of competition.

I. SUMMARY AND OVERVIEW

In the event that the Commission believes that the Act's multiple station ownership limits address competitive concerns, the Department would then recommend that the Commission view JSAs between same-market radio stations as attributable interests for purposes of applying the Act's ownership limits. JSAs, which typically involve the transfer of the right to price and sell advertising from one competitor to another as well as coordination of other business and programming operations, are competitively similar to common equity ownership. Accordingly, failure to treat JSAs as attributable interests could provide opportunities for parties to circumvent any competitive purposes of the multiple ownership limits of the 1996 Act. Moreover, to facilitate effective monitoring of these agreements, the Commission should impose notification and filing requirements for all radio JSAs.

The Department supports the Commission's efforts to address multiple nonattributable relationships and views the Commission's proposed "equity or debt plus" attribution rule as a decided improvement over its current approach. The Department commends the Commission's recognition, reflected in its proposed approach, that relationships other than the ownership of voting stock and participation as an officer or director can allow an entity to influence substantially the operations and strategies of a station. The Department's experience suggests that parties can devise a wide variety of relationships which permit influence or control over critical policies and decisions, without implicating the Commission's current attribution rules. While no single rule can anticipate the myriad of arrangements that may confer such influence or control, the proposed approach is a reasonable limitation on the ability of parties to avoid the constraints of both the multiple ownership limits and existing attribution rules. The Commission should, however, retain the flexibility to address other relationships, which in conjunction with equity or debt interests below the applicable threshold, confer significant control and influence.

The Department urges the Commission to be mindful of the relevant antitrust principles in its approach to market definition in developing and applying its radio-television cross ownership rule. In evaluating the competitive effects of mergers and acquisitions under Section 7 of the Clayton Act, the Department defines relevant markets based on assessments of the substitutability of products and services as set forth in the 1992 Horizontal Merger Guidelines ("Merger Guidelines"). Nonetheless, we recognize that the Commission's approach to market definition in this context may properly differ from the principles outlined herein and explained more completely in the Merger Guidelines. To the extent it is necessary for the Commission to use antitrust approaches to market definition in this proceeding, we urge the Commission to follow the principles outlined herein.

The Department has limited experience to date in evaluating the competitive effects of mergers involving broadcast television stations operating in the same local market. However, in evaluating any proposed revisions to the local ownership rule, the Department urges the Commission to be sensitive to potential competitive concerns relating to consolidation in local and national markets, as well as the potential impact of digital television technology. Finally, consistent with the analysis set forth below regarding the attribution of JSAs, the Department believes attribution of television LMAs towards the relevant ownership limits to be appropriate and further urges the Commission to establish a notification and filing requirement for television LMAs.

II. SAME-MARKET RADIO JSAs SHOULD BE ATTRIBUTABLE INTERESTS UNDER THE COMMISSION'S RULES[2]

Section 202 of the 1996 Act eliminated all national radio multiple ownership limits and loosened the Commission's existing caps on the number of radio stations a single party may own, control or operate in a local market. In so doing, the Act allowed for significant consolidation in the radio industry, provided that such consolidation comported with the antitrust laws. The Act made clear that the antitrust laws would play a critical role in the transition to a more de-regulated, competitive landscape, explicitly stating that it did not in any way "modify, impair or supersede the applicability of the antitrust laws."[3] In addition to underscoring the key role of antitrust scrutiny, the 1996 Act also put in place limits on the number of stations a single entity could own or control in a local market.

The Department plays a major role in evaluating whether a radio merger may be consummated through its enforcement of Section 7 of the Clayton Act. In evaluating a proposed merger or acquisition involving broadcast stations under Section 7, the Department analyzes the likely competitive effects of a given transaction on a case-by-case basis. This analysis does not turn on any particular market share or limit on the number

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[2]At present, the Department has investigated JSAs only in the radio industry. Our comments are therefore limited to the impact of such arrangements in this industry.

[3]Section 601(b)(1) of the 1996 Act.

of stations a single entity can own or control, but rather considers a wide variety of factors to determine whether a merger would be likely to substantially lessen competition.

In fulfilling its role of enforcing the antitrust laws, the Department has also analyzed the competitive effect of certain radio JSAs. Evaluating JSAs on their own merit, the Department engages in a stepwise inquiry under Section 1 of the Sherman Act to determine whether a JSA passes muster.[4] In particular, the Department applied this type of analysis in concluding that a JSA between two stations in Rochester, NY violated Section 1 of the Sherman Act. See United States of America and State of New York v. American Radio Systems Corporation, et al., No. 96-CV-2459 (D.D.C.) ("ARS Corp.").[5]

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[4]The Department's analytical approach is more fully explained in Acting Assistant Attorney General Joel I. Klein's speech, "A Stepwise Approach to Antitrust Review of Horizontal Agreements" delivered on Nov. 7, 1996 at the American Bar Association's Antitrust Section Semi-Annual Fall Policy Program, attached hereto as Exhibit A.

[5]In ARS Corp., the Department found that before entering into a JSA, the Rochester stations had been direct competitors, and advertisers had obtained better prices from each of them by playing them off against each other in negotiating advertising purchases. The JSA eliminated this competition by giving one station complete control over the advertising sales of its direct competitor, thereby creating the inference that the JSA would have anticompetitive effects. The Department then considered whether the JSA possessed any redeeming procompetitive virtues, but the creators of the JSA suggested none and none were apparent to the Department. (Indeed, the Department uncovered evidence that the purpose of the JSA was to eliminate price competition between the two stations.) Thus, the Department concluded that the JSA at issue was an illegal restraint of trade under the Sherman Act in that it directly eliminated competition between the parties to the agreement and conspicuously lacked procompetitive virtues.

In contrast to the Department's competitive analysis under the antitrust laws, the Act's numerical caps appear to reflect a Congressional balancing of a variety of concerns relating to competition, diversity, and administrative convenience.[6] The Department's analysis of the ownership limits at issue in these proceedings considers only their competitive effects. Thus, if the Commission were to determine that the numerical caps on station ownership were grounded, at least to a significant extent, in a concern for diversity of programming, that would require a different analysis by the Commission. Nonetheless, to assist the Commission in the present proceedings, the Department offers its recommendation on the assumption that the numerical limits reflect a congressional judgment that such limits are necessary as a safeguard against anticompetitive consolidation. On that understanding, the Department views it as appropriate for the Commission to consider JSAs encompassing same-market radio stations attributable interests.[7]

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[6]As noted above, the Department's antitrust review does not call for or focus on any particular ownership limits. The Department will, of course, continue the enforcement efforts outlined above regardless of the outcome of this proceeding.

[7]The Commission inquires whether its concern with and focus on JSAs in local markets is the proper approach. The Department supports this approach, as it is consistent with the approach used by Congress, the Commission with respect to radio LMAs, and the Department's approach in merger and JSA investigations. Radio advertisers generally seek to communicate to listeners within a particular local geographic area; radio stations whose listeners are located in other areas therefore are not good substitutes for those advertisers, and would not constrain any market power that might be exercised by stations that do serve that local area.

As noted above, the Department has carefully evaluated the competitive implications of JSAs in the course of investigating mergers and acquisitions of radio broadcasters and in other contexts as well. Although there are differences among JSAs, these arrangements typically grant one party *de facto* exclusive rights to price and to sell the advertising time of the other.[8] These arrangements explicitly transfer the right to sell a significant amount of the advertising time of the brokered station, while reserving for the brokered station rights to sell some amount of its own advertising time. In practice, however, these reserved rights are rarely exercised. In the vast majority of arrangements analyzed by the Department, the brokered stations did not retain their own sales force, and therefore lack the ability to sell advertising. Instead, all inquiries from potential advertisers are simply referred to the brokered station's JSA partner.

Advertising sales are usually a radio station's predominant if not only source of income, and a station's advertising sales generate the revenue which funds all other operations. Thus, a party which has gained control of a station's advertising sales through a JSA has gained control of that station's most basic business operations. Moreover, since the creation and maintenance of a steady revenue stream is vital to the success of a station,

[8]These types of arrangements go by a variety of names, including JSAs, Advertising Brokerage Agreements, Sales Representation Agreements or Time Purchase Agreements. Following the Commission's terminology, the Department uses the term "JSA" to refer to any such agreement through which one owner sells a significant portion of the advertising inventory of its same-market competitor.

efforts to ensure successful advertising sales have considerable effect on stations' choices of format and programming, and on other measures employed to attract and hold listeners. Reflecting this, the Department's investigations reveal that, even when they comply with FCC regulations, JSAs are often accompanied by close cooperation and coordination among the affected stations, encompassing programming and other competitively significant decisions.

Because a JSA closely resembles actual ownership, the Department has concluded that brokered stations should generally be treated as part of the controlling station's group for purposes of analyzing concentration and the likely competitive effects of mergers under Section 7 of the Clayton Act. Since JSAs place pricing and output decisions for the affected stations under the control of a single firm, competitive rivalry between or among those stations is eliminated, just as it would be in a merger. The competitive concerns that arise from increased concentration in a market, therefore, are directly implicated by JSAs.

Given the competitive similarity between common equity ownership of stations and JSAs, we believe that -- based on the understanding of the ownership caps outlined earlier, see p.7 -- it would be appropriate to treat JSAs as attributable interests under the Commission's rules. At the same time, a decision to attribute JSAs towards the ownership limits would not prevent broadcasters from making use of JSAs to achieve significant efficiencies. Treating JSAs as attributable interests would permit stations to combine their sales operations and to achieve any cost savings that might be associated with that combination, so long as the total number of stations combined (through equity ownership and JSAs) does not exceed the limits imposed by section 202 (b).[9] Finally, the Department recommends that the FCC adopt rules requiring the disclosure of radio JSAs to the Commission. Such a notice and filing requirement will provide a means for effective monitoring of these arrangements by the Commission and antitrust enforcement authorities.

III. THE DEPARTMENT SUPPORTS THE PROPOSED EQUITY OR DEBT PLUS APPROACH

The Commission proposes to address concerns about multiple nonattributable relationships, as well as abuses of the single majority shareholder and nonvoting attribution exceptions, by adopting an "equity or debt plus" attribution rule. Under the proposal, when a debt or equity interest exceeds a certain benchmark, and the interest holder also owns other significant interests in or relationships to a licensee that could result in the ability to exercise significant control, the interest would be attributable. The

[9]Compliance with those limits, of course, would not create any immunity from the antitrust laws. The Department will evaluate and has sometimes challenged station combinations, through equity ownership and JSAs, which fall below the numerical limits imposed by section 202 (b), to determine if they would have an adverse effect on competition.

Commission does not propose to eliminate the current nonvoting stock and single majority shareholder exceptions, but rather seeks to refine its rules to recognize that equity or debt holders may also have other interests in or contractual rights with respect to a licensee that permit a degree of control or influence justifying attribution. The Commission seeks comments on whether the equity and/or debt benchmarks should be triggered where the interest holder is either a program supplier, or a broadcaster or other media entity which operates in the same market.

The bulk of the comments oppose the Commission's proposal on a variety of grounds. Some comments express disapproval of the equity or debt plus approach, and recommend that the Commission address the concerns by increasing the voting stock and passive investment attribution limits.[10] Others were concerned that the proposed rule would constrict a licensee's ability to obtain financing, through investment or debt.[11] Still others observe that the relationship of program supplier is not accompanied by the power to exercise control over core station decisions,[12] or suggest that the Commission should limit the application of the rule by narrowly defining "program

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[10]Comments of CBS, Inc. at pgs. 8-10; Comments of Tele-Communications, Inc. at pgs. 3-8; Comments of National Association of Broadcasters at pgs. 3-5; Comments of ABC, Inc. at pgs. 3-4.

[11]Comments of Fox Broadcasting Company at pgs. 2-3; Comments of Tele-Communications, Inc. at pgs. 13-18.

[12]Comments of Fox Broadcasting Company at pgs. 6-7; Comments of King World Productions, Inc. at pgs. 2-4.

suppliers."[13] Those who support the Commission's proposal viewed it as an efficient way to prevent the use of investment to circumvent national and local ownership rules, and suggested that the approach would not deter investment.[14] These comments also note, consistent with the Commission's own observations, that there are numerous types of interests and relationships that give the interest holder influence over a station's operational decisions.

The Commission's proposed approach recognizes the reality that relationships other than ownership of voting stock and participation as an officer or director can allow an entity to substantially influence the operations and strategies of a station. Substantial investments by a company in nonvoting stock or debt of its competitor can limit competition in two ways. First, the investment may allow the company to have the ability to control or influence significant decisions of its competitor, e.g., by limiting the competitor's ability to incur debt, sell assets or enter into strategic joint ventures without the company's approval. As described below, the Department's observations in radio investigations support that there is the potential for investors or creditors to exert significant influence over key

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[13]Comments of Knight-Ridder, Inc. at pg. 7 (exclude newspapers from "program supplier" definition); Comments of King World Productions, Inc. at pgs. 5-6 (exclude syndicator from "program supplier" definition); Comments of Network Affiliated Stations Alliance at pgs. 6-7 (apply rules to networks only).

[14]Comments of Media Access Project, et al. at pgs. 7-10; Comments of Viacom, Inc. at pgs. 7-9.

decisions of a competitor through contractual rights, even though they lack a voting or majority interest. Second, substantial loans or investments in a company by a competitor may diminish the competitor's incentive to compete aggressively. The competitor will have less incentive to compete aggressively against that station, because it will have a financial stake in the profits earned by that station; such aggressive competition may diminish the value of its investment or place in doubt the company's ability to repay its debts.[15]

Through its radio investigations, the Department has observed that in certain situations entities that hold substantial debt or equity interests in stations often obtain the ability to exercise influence over significant aspects of the stations' activities.[16] For example, in one matter, a multistation owner fully financed the acquisition of competing stations by an associate, and then entered into JSAs with the associate's stations and played an advisory role to the associate in formulating programming strategy and in other critical operational decisions.

In another matter, the beneficial owner of the majority of voting shares of an entity that owns radio stations also exercises substantial control over key operational decisions of competing radio stations in the same market, despite the lack of any attributable interest in those competing stations

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[15]The Department has not examined extensively the relationship between programming suppliers and radio stations, and therefore has no comments on this aspect of the proposed rule.

[16]This observation is not unique to radio, but could be true in any market.

under the Commission's current rules. This party is the beneficial owner of a substantial nonvoting equity interest in those competing stations, and controls another corporation which has a consulting contract with those stations. Through this consulting contract, the party supplies financial and advisory services to the competing stations; designs and implements systems to conduct core operational functions; provides advice on strategic issues including the purchase and sale of stations; and conducts negotiations for the purchase of stations.

These examples indicate that parties can devise a wide variety of relationships which permit influence or control over critical station decisions and policies, while lacking any attributable interest in that station under the Commission's current rules. The proposed bright line test is an improvement over the current approach, because it will help define the relationships that promote the influence and control that raise competitive concerns, as well as provide the industry with guidance. Additionally, the proposed approach will serve as a reasonable limit on the ability of parties to avoid the constraints of the multiple ownership limits by devising arrangements that confer influence or control over a station's affairs while escaping attribution for purposes of ownership limits. However, the Commission should recognize that no single rule can anticipate all the arrangements that may confer such influence or control. While the proposed approach has merit in terms of administrative convenience and clarity, it may not address other contractual arrangements that are coupled with debt or equity interests below the applicable threshold, which also confer significant control and influence. Accordingly, to assist in detecting such arrangements, the Commission should consider, among other steps, promulgating reporting requirements that would require the disclosure of relationships which provide significant control or influence over a station's operations. Also, the Commission should retain the flexibility to address, on a case by case basis, relationships that do not trigger the equity or debt plus rule, but nevertheless enable the interest holder to exert influence over a station's core operational functions.

IV. APPROACHES TO MARKET DEFINITION UNDER THE RADIO-TELEVISION CROSS OWNERSHIP RULE

In light of the recent changes to the local radio ownership rules, the Commission solicits further comments on its radio-television cross ownership rule which limits the number of TV and radio stations that one entity can own in a local market. The Commission notes that the comments received in response to its previous NPRM had not resolved the issue as to which product market definition should be used in assessing diversity and competition issues. Commenters had disagreed as to whether radio and television were economic substitutes.[17] The Commission had proposed in that NPRM to eliminate the rule entirely if it concluded that TV and radio stations did not compete in local advertising markets and that the rule was

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[17]SFNPRM, ¶ 63.

unnecessary to preserve diversity. In its current rulemaking, the Commission tentatively concludes that it will not eliminate totally its cross ownership rule. The Commission does however still seek comments on how to appropriately define the relevant local advertising market for purposes of developing standards to be used in evaluating waiver requests.[18]

For reasons explained below, we believe the Commission's approach to market definition in this context may properly differ from market definition principles adopted by the Department and the courts under the antitrust laws. The Department's approach to evaluating the competitive effects of horizontal mergers and acquisitions under Section 7 of the Clayton Act is set forth in the Merger Guidelines. Under the Merger Guidelines, the Department defines relevant markets based on assessments of the substitutability of products or services. Products that are close substitutes for one another are considered to be in the same market. In order to assess degrees of substitutability, the Department asks whether a hypothetical monopolist of those products could profitably impose a small but significant and nontransitory price increase. If such a price increase would be unprofitable because a significant number of purchasers would choose to purchase <u>other</u> products, those other products would be considered to be in the same market.

In some cases, this analysis reveals that some of the purchasers of a

[18] SFNPRM, ¶77.

product can easily turn to other substitutes, while other purchasers lack good substitutes. To the extent that the hypothetical monopolist could engage in price discrimination, by raising prices only to those customers who lack good substitutes, a small but significant and nontransitory price increase to those customers might be profitable, even if an across-the-board price increase to all customers would be unprofitable. If so, the Department would regard sales to the customers who lacked good substitutes as a separate market.

In applying this analytical framework to markets for the sale of advertising, the Department has considered which products are regarded as close substitutes by advertising purchasers. Advertising media differ significantly from one another, in terms of the types of information they can effectively convey, the audiences they reach, and cost. Advertising purchasers are also a heterogeneous group, with important differences in the type of information they wish to communicate and the audiences they wish to reach. Advertising is frequently sold through individualized negotiations, in which sellers are acutely aware of the alternatives available to specific customers, and can raise or lower price depending on the individual customer's ability to turn to substitutes. The Department generally has concluded that hypothetical monopolists of specific advertising media would be able to price discriminate, so as to profitably raise prices to those customers for whom other media were not good substitutes, even if the hypothetical monopolist could not profitably raise prices to <u>all</u> customers.

Therefore, the Department has challenged acquisitions under section 7 of the Clayton Act based on its determinations that the sale of newspaper advertising,[19] the sale of billboard advertising,[20] and the sale of radio advertising,[21] constituted relevant product markets, in each case concluding that a significant group of customers could not economically substitute advertising through other media.[22]

For a variety of reasons, however, the Commission may properly conclude that it should not attempt to use, in this context, the approach to market definition that would be appropriate under the antitrust laws.[23] First, of course, the Commission's policies in this area reflect concerns that

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[19]Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146 (W.D. Ark. 1995)(appeal pending).

[20]United States v. Outdoor Systems, Inc., Civ. No. 1-94-CV-2393-CC (N.D. Ga. 1994).

[21]United States v. EZ Communications, Inc., No. 97-CV-406 (D.D.C. 1997); United States v. American Radio Sys. Corp., No. 97-CV-405 (D.D.C. 1997); United States v. Westinghouse Electric Corp., No. 96-CV-2563 (D.D.C. 1996); United States v. American Radio Sys. Corp., No. 96-CV-2459 (D.D.C. 1996); United States v. Jacor Communications, Inc., No. C-1-96-757 (S.D. Ohio 1996).

[22]In the SFNPRM, the Commission sought comment on whether the relevant advertising market for purposes of analyzing cross-ownership issues should focus solely on advertising on radio and television. ¶77. While it is theoretically possible that there are customers who would be adversely affected by mergers between radio and television stations (e.g., television advertiser customers who would switch to radio in response to small increases in television advertising prices), the Department, in investigating radio mergers, has not uncovered evidence supporting such a market definition from an antitrust perspective.

[23]Similarly, the Commission should recognize that the Department and the courts, in their analysis, may not use the market definition adopted by the Commission in this proceeding.

include, but are not limited to, commercial competition. The Commission's policy also reflect concerns about diversity and the number of independently owned sources of news and entertainment. Second, for purposes of clarity and administrative efficiency or necessity, the Commission may wish to adopt policies that may be applied objectively using publicly available sources of information, rather than attempting to evaluate factors, such as customer preferences, that are competitively significant, but can be established only after extensive investigation. We therefore do not believe that the Commission should necessarily rely on antitrust market analysis in this proceeding.

V. LOCAL TELEVISION OWNERSHIP RULES AND TELEVISION LMAs

In this proceeding, the Commission has proposed exempting UHF/VHF and UHF/UHF combinations from the application of the local broadcast television ownership rule. The Department has limited experience to date in evaluating the competitive effects of mergers involving television broadcast stations operating in the same local market. However, the Department believes that in evaluating any proposed revisions to its local ownership rule, the Commission should be particularly sensitive to three basic concerns.

First, mergers involving local television broadcast stations may raise significant antitrust concerns in local advertising markets. UHF-VHF, or even UHF-UHF, combinations could potentially control a significant share of the local advertising revenues in such a market, and may have an adverse competitive effect on advertisers. Second, relaxation of local ownership restrictions is likely to result in increased concentration in local television broadcast markets, which, under certain circumstances, could affect the continued growth of new and nascent national television networks. Third, the Commission should consider the potential impact of the advent of digital television ("DTV") technology on the television broadcasting industry.[24] The Commission's resolution of issues relating to spectrum allocation and recovery, as well as managing the transition from existing broadcasting services to the digital era, will determine how and to what extent digital technology alters the current competitive landscape.[25] Moreover, the promise of digital spectrum may create greater incentives for, and result in even more dramatic consolidation in television broadcasting markets, than experienced in the radio industry subsequent to the passage of the 1996 Act.

Of course, wholly apart from these competitive concerns, the Commission may well determine that relaxation of these ownership restrictions is not appropriate at this time in light of diversity concerns which

[24]The Commission has an ongoing proceeding to assess issues pertaining to DTV. See In the Matter of Advanced Television Systems and their Impact upon the Existing Television Broadcast Service, Sixth Further Notice of Proposed Rule Making, MM Docket No. 87-268 (Aug. 14, 1996).

[25]Indeed, the proposed exceptions to the duopoly rule are premised in part on the notion that UHF stations operate at a competitive handicap to their VHF counterparts, a distinction which must be revisited as digital television becomes a reality.

are uniquely within the province of the Commission. Regardless of the Commission's decision, the Department will continue to monitor broadcasting markets to ensure compliance with federal antitrust laws. Accordingly, both the Commission and the Department will have ongoing and complementary roles in evaluating the future direction of broadcast markets in this country.

The Commission also seeks comments on how to treat local marketing agreements ("LMAs") in the television industry for purposes of applying local and national ownership restrictions.[26] A television LMA typically involves a contract whereby the licensee station leases some or all of its broadcast time to the brokering station, which then supplies the programming for that station and has the right to sell all of the advertising spots supporting that programming. The brokering station retains all of the revenues generated by the sale of that advertising time, and in exchange typically pays a fixed monthly fee to the licensee station. In effect, the brokering station assumes day-to-day operating responsibility and control over the licensed station's programming and advertising sale, although the licensee remains ultimately responsible for ensuring that the station complies with FCC requirements.

The Commission has proposed attributing television LMAs based on the same principles that apply to radio time brokerage agreements. Thus, any LMA which grants the brokering station control over more than 15% of

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[26]See FNPRM, ¶27; In the Matter of Broadcast Television National Ownership Rules, Notice of Proposed Rule Making, MM Docket Nos. 96-222, 91-221 and 87-8 (Nov. 7, 1996), ¶26.

the licensee station's weekly broadcast hours would result in attribution of the licensee station towards the brokering station's national and local ownership limits. The Department notes that under the antitrust laws, LMAs are quite similar, in competitive effect, to ownership of the licensee station. That is, if the brokering station controls the sale and pricing of a significant portion of the licensee station's advertising inventory, the Department likely would consider the licensee station to be "owned" by the brokering station for purposes of our merger analysis.[27] Moreover, attribution of television LMAs in this regard is thus quite similar to the attribution of same market JSAs in the radio industry.[28] Accordingly, on the same basis outlined earlier as to whether JSAs should be attributable, the Department views it as appropriate to attribute television LMAs for purposes of applying local television ownership restrictions.[29]

In addition, the Department believes a notification and filing requirement for television LMAs will assist the Commission and antitrust enforcement authorities in evaluating the competitive significance of these

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[27]Moreover, it is the Department's position that LMAs executed in connection with a television broadcast station acquisition cannot be put into effect prior to the expiration of any applicable Hart-Scott-Rodino waiting period.

[28]See supra at 5-10.

[29]The Department acknowledges that attributing LMAs towards the Act's ownership limits would raise the question of whether fairness or other concerns suggest that existing LMAs should be immune from this rule. The Department, however, takes no position on this question, noting merely that it will investigate all such arrangements to ensure that they comply with the antitrust laws.

arrangements. Indeed, the simple fact that television LMAs (unlike similar arrangements in the radio industry) have historically not been subject to any type of reporting requirement has had the practical effect of limiting scrutiny of such arrangements by either the Commission or antitrust authorities. The Department urges the Commission to adopt some form of reporting requirement for television LMAs that will allow meaningful review and monitoring of these devices by the Commission and, where appropriate, by antitrust enforcement authorities through a review of materials provided to the Commission.

Sincerely,

Joel I. Klein

Joel I. Klein

cc: Commissioner James H. Quello
Commissioner Rachelle B. Chong
Commissioner Susan Ness

DEPARTMENT OF JUSTICE

A Stepwise Approach to Antitrust Review of Horizontal Agreements

Address by

JOEL I. KLEIN
Acting Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
American Bar Association's
Antitrust Section Semi-Annual Fall Policy Program

The Westin Hotel
Washington, D.C.

November 7, 1996

Exhibit A